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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 676.

CASKEY BAKING COMPANY, INCORPORATED, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

REPLY BRIEF ON BEHALF OF APPELLANT.

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REPLY BRIEF ON BEHALF OF APPELLANT.

To the Honorable Justices of the Supreme Court of the United States:

The brief filed herein by the appellee contains many authorities and statements that *per se* constitute reliable declarations of legal principles. However they are so clearly inapplicable to the case at bar, that counsel for appellant are of the opinion that a reply, illustrating the inapplication of those rules and authorities to the case at bar, would be helpful in arriving at a proper conclusion.

The appellee has formulated new contentions not formerly relied upon by it, and, in several instances has departed entirely from positions heretofore taken.

The divisions and headings of appellant's brief will be followed in this reply, for the sake of consistency and clarity.

Numerals in parenthesis, unless otherwise noted, refer to the pages of appellee's brief under consideration.

I.

The Business Conducted by Appellee in Virginia is not Interstate Commerce, but is Purely Local in Character and Within the Taxing and Regulatory Police Power of the State. (p. 5)

In support of this heading the appellee has cited the cases of *Howe Machine Co.* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, and *Wagner* v. *Covington*, 251 U. S. 95. These cases would apply in the situation at bar if there were no discrimination against the goods because of their out of state manufacture. But in each of these cases, particularly *Wagner* v. *Covington*, which was copiously quoted from by appellee, the Court found that the license tax imposed applied to *all* peddlers, resident and non-resident. And therein lies the distinguishing element not present in the case at hand. In the *Reymann Brewing Company* case regulation of an intoxicating beverage was as much the ground of decision as the question of a tax.

This element, to-wit, unequal treatment of goods moving in inter-state commerce with those within the State, is the distinguishing feature of all the cases. When goods coming into the State are discriminated against—whatever the form, the statute, permitting or causing the discrimination, is in conflict with the constitution. This Court has consistently followed this rule since *Brown* v. *Maryland*, 12 Wheaton 419, 6 L. Ed. 678, decided in 1827. See *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, 83 L. Ed. 771.

Moreover, the test of the interstate character of goods is their ultimate destination. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 103; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601. Said Mr. Justice Stone in the latter case:

> "Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress."

The appellant transports across state lines (R. 17) and some of its products, when manufactured, are so intended to be carried. Could it be said that the National Labor Relations Board could not take jurisdiction of appellant's employer and employee relationship?

II.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Police Power to Regulate the Business of Itinerant Peddling. (p. 7)

For the first time the appellant is met with the contention that the more important function of Section 192b is to *regulate* itinerant peddlers. Until this declaration the appellee had insisted that the appellant should bear its full share of taxation in Virginia, and, that because it paid no direct taxes, Section 192b, remedied this omission by imposing upon it an indirect tax and exempting those similarly situated who paid direct taxes.

But appellant pays a far heavier franchise tax than a Virginia corporation. It pays an income tax on the business done by it in Virginia. In fact, it is stipulated that it pays all taxes imposed on it by Virginia, except the one under attack. And why should it be forced to contribute in taxation for the numerous benefits such as ownership, protection of property, and person, which are inherently the rights of a resident manufacturer and without which he likely could not exist, when in fact the appellant is a non-

resident manufacturer and could not use those benefits in any event?

This new position of the appellee falls in the face of *Phoebus* v. *Manhattan Social Club,* 105 Va. 144, 52 S. E. 839, which held that a license tax imposed for the unconditional right of doing any act, without regulations, is a revenue tax. And no regulation of the appellant has been shown in the record nor do the statutes of Virginia provide any.

Moreover, the appellant is a corporation domesticated in Virginia, (R. 16). It has been received there to do business. Any tax laws made to apply to a foreign corporation after such reception are to be considered laws enacted for the purpose of raising revenue and must conform to the equal protection clause of the 14th Amendment. *Hanover Fire Insurance Co.* v. *Carr,* 272 U. S. 494. This doctrine is again laid down in *Conn. Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 82 L. Ed. 673, wherein it was held that a corporation which is allowed to come into a state and there carry on its business, may claim the protection of the 14th Amendment, against a subsequent application to it of state law.

There, the corporation had been engaged in business in the taxing state years before the act became applicable to it. The same is true of the appellant in Virginia.

But if regulation be necessary, because of the itinerant character appellee attributes to appellant's business and in order to protect the licensed retail dealers of Virginia from cheat, fraud, etc., which is the purpose of a license tax on itinerant peddlers, the remedy is constantly available. Appellant has designated a resident statutory agent in Virginia (R. 17) to whom the Commonwealth can complain. An action of *quo warranto* can always be instituted. Consequently, while it is true that the appellant is a peddler, these facts are sufficient to show that the appellant is not an itinerant. Likewise the stipulation nullifies the charge of itineracy, the appellant sells over regular routes, at regular intervals, to regular customers who are licensed retail dealers.

If regulation be the purpose of Section 192b, the discrimination against appellant becomes more evident. No reason exists why the appellant, who is a manufacturer, should be burdened with restrictions and a tax and the peddlers of seafood, tobacco, oil, petroleum products and manufacturers taxable on capital, should be allowed to peddle in the same manner without any hindrance or tax. See *Smith* v. *Cahoon*, 203 U. S. 553.

It has been suggested by the appellee (p. 14) that there is no evidence that the exempted vendors come into competition with the appellant, nor are facts established from which it could be inferred that the exempted vendors are of the character requiring regulation. The Court judicially knows bakery products are manufactured in Virginia, or else that State is totally different from all others. And under section 73 of the Tax Code the manufacturers thereof are taxable on capital and, therefore, exempt from Section 192b. The Court further judicially knows that the method of sale pursued by the appellant has been the universal custom of bakeries and other wholesalers of perishable food products in this country for many years. And undoubtedly, as the appellee will admit, many bakeries manufacturing in Virginia, sell their products in the manner employed by appellant.

Pacific States Box & Box Basket Co. v. *White*, 296 U. S. 176, is the principal reliance of the appellee under this heading. That case was decided solely upon the factual situation. The regulation there attacked was found to be in the public good in order to preserve a fresh foodstuff and set up a standard measure by which the public could be guided in its purchases. No such justification can be found in Section 192b.

III.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Taxing Power and Does Not Unlawfully Discriminate Against Appellant or Deny It Equal Protection of the Laws.

The appellee, under this title, seeks to justify the tax imposed on appellant by showing that it is a part of the tax structure of Virginia. If it is such a part, it only became so by an Act of the Virginia Assembly of 1938, proposed by a legislator from Arlington County, a county separated from the District of Columbia only by the Potomac River. No attempt, previous to the passage of the Act, was made to collect the tax, in fact the statute originally exempted "a producer". The amending Act of 1938 added "of agricultural products", to "producer". (Appellant's brief p. 6) The legislature of Virginia knew that many persons could not be "taxed on capital" unless they came into Virginia and manufactured there.

Appellee contends (p. 17) that the taxing system of Virginia is so constituted that it lays a single capital tax for the right to manufacture, in which is included the right to sell the manufactured product. The answer to that is that the tax on capital, such as is prescribed in Virginia, cannot be said to be for the right to sell, because it is not a privilege tax on the right to peddle, it is a tax based on the amount of capital employed in the business. The manufacturer is paying a tax for the property benefits that accrue to that capital because of its situs in Virginia, not for the right to sell.

If Section 188 of the Tax Code, as contended by appellee (p. 22), substantiates this argument of appellee that the capital tax on the resident manufacturer includes the right to sell, why then was the appellant considered exempt until the passage of Section 192b? And why, also, was Section 73 not confined specifically to manufacturers?

The appellee suggests (p. 20) that the burden on the manufacturer, taxable on capital, may be heavier than on the

peddler. For ought the record shows the tax may be heavier on the peddler. Section 192b imposes a $100.00 license tax on each vehicle employed, not on the entire business. It may very well be, and, is, the case that a non-resident baker could have ten trucks employed in his Virginia business. The fact that the statute was proposed by an Arlington County legislator now becomes pertinent to the question of discrimination against non-resident manufacturers. And the statement of appellee (p. 15) that the peddler's tax amounts only to some thirty odd cents per day, is refuted.

The case of *Wisconsin* v. *C. J. Penny Co.* decided December 16th, 1940, (85 L. Ed. Adv. Op. 223), cited by appellee has no application here. The Court there found a reason for the tax, namely, loss of revenue due to dividend exemptions which the State was seeking to make up by assessing a new kind of dividend tax *which applied both to local and foreign corporations.* The Court found that there was no discrimination.

It is also insisted by the appellee (p. 25) that a resident manufacturer is exempt from Section 192b only when he pays a tax on all the items he possesses. Section 73 does not so provide. If a manufacturer does a cash business, or operates at a loss, according to the appellee's statement, he would not be exempt, if he had no materials on hand or in storage, or money on hand or on deposit. In other words, since real estate, machinery and tools are not capital under the statute, only the affluent manufacturer can be exempt. Obviously if a resident manufacturer pays a tax on any one of the items of capital enumerated in Section 73, he is exempt.

If a Virginia corporation manufactures in another state, the appellee contends (p. 26) that it is not exempt from Section 192b because only its capital actually employed in business in Virginia is taxed. But if it has its offices in Virginia it is taxed on capital. *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 79 L. Ed. 171, in interpreting Section 73 held that money on hand and bills of account receivable have their situs for taxation purposes in Virginia. The

situs of intangibles is at the domicile of the creditor. *Smith* v. *Ajax Pipe Line Co.*, 87 Fed. (2nd) 567, cert. den. 300 U. S. 677; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234; *Curry* v. *McCanless*, 307 U. S. 357 (bank deposits).

Lawrence v. *State Tax Commissioner*, 286 U. S. 276, has no application to the case at bar. A reasonable distinction for the difference in classification was found, to-wit, the income of a private individual and the income of a corporation.

The Armour Case and the Caskey Case Distinguished.

The Commonwealth of Virginia relies strongly upon the case of *Armour and Company* v. *Commonwealth of Virginia*, 246 U. S. 1, 62 L. Ed. 547, in support of its claim that Section 192b of the State Tax Statute is valid.

The Caskey Baking Company relies strongly upon the case of *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029, 41 Sup. Ct. 571, in support of its position that the Tax Statute is invalid.

These cases apparently reach different conclusions from substantially the same facts and circumstances, but, in reality, the cases can be clearly distinguished.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547, also 118 Va. 242, 87 S. E. 610.

Briefly stated, the facts in this case are as follows: Armour and Co. engaged in packing meat outside of the State of Virginia, which it shipped into Virginia to its regularly established agencies. Armour and Company had no packing plant or manufacturing plant in the State of Virginia.

The State of Virginia enacted a statute which imposed a license tax for the privilege of engaging in business in Virginia as a merchant. The amount of tax imposed by this statute was determined by the amount of purchases made by the merchant, and all goods manufactured by the merchant were construed to be purchases within the meaning of the act.

This tax was applicable to all merchants doing business in the State of Virginia, except,

> "This section shall not be construed as applying to manufacturers taxed on capital by this state, who offer for sale at the place of manufacture, goods, wafes and merchandise manufactured by them."

Armour and Company paid the tax based upon all purchases of goods and merchandise, manufactured by other manufacturers, and sold by its agencies established in Virginia, but declined to pay a merchant's tax based upon the amount of merchandise manufactured by itself and sold in Virginia.

Armour and Company attacked the validity of the statute upon the same grounds upon which we are attacking the validity of Section 192b of the Virginia Tax Statute. The Supreme Court, in the *Armour* case, held the statute to be valid. It based its holding solely upon the ground that Virginia made a reasonable and proper classification, when it imposed a tax on manufacturers who did not sell their products at the place of manufacture, while it did not impose the tax upon manufacturers who sold their manufactured products at the place of manufacture.

The confusion arises from the unwarranted assumption that the Supreme Court intended to hold that the classification was based upon whether or not the manufacturer was taxed on capital by the State of Virginia. It is true that the statute makes reference to manufacturers taxed on capital by the State of Virginia, but, apparently, it was not contended by counsel representing Armour and Company that this constituted part of the classification that was unreasonable and illegal. The opinion of the Court is based specifically upon the fact that the purpose of the Virginia Legislature was to exempt from the tax the manufacturer who sold his products at the place of manufacture without regard to the payment of tax or capital.

In the case at bar the statute applies to all wholesale peddlers and, by way of classification, exempts all manufac-

turers taxed on capital by this state, irrespective of where they sell their goods or the manner in which they peddle. We are, therefore, presenting a new problem to the Court, not decided in the *Armour* case, to-wit: is it a reasonable and proper classification to differentiate between a manufacturer taxed on capital by the state imposing the tax, and a manufacturer not taxed on capital? For the reasons clearly outlined and discussed in the opening brief of the Caskey Baking Company, it is obvious that this is not a reasonable or proper classification. Particularly is this true because it is impossible for a non-resident manufacturer to be taxed on capital by the State of Virginia, unless he engages in the manufacturing business within Virginia, a condition impossible of performance by the foreign manufacturer.

Bethlehem Motors Corp. v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029.

In this case the facts may be briefly summarized as follows:

The Bethlehem corporation was a Pennsylvania corporation engaged in the business of manufacturing motor trucks. The National Motor Car Corporation was an Indiana corporation engaged in manufacturing automobiles. W. Irving Young & Company was a Delaware corporation employed as the agent of said manufacturing corporations to sell their trucks and cars in the State of North Carolina. This Delaware corporation conducted its agency business through the Liberty Motors Corporation and the National Motors Corporation, which were North Carolina corporations. The automobiles and trucks were consigned to the North Carolina corporations, and were sold direct by them from their storage warehouse.

A North Carolina statute required that every manufacturer of automobiles, engaged in the business of selling the same in that state, should pay a license tax of Five Hundred Dollars ($500.00). This statute then exempted partially from the payment of this license tax, manufacturers

who invested at least three-fourths of their entire assets in the bonds of the state, or any of its counties, cities and towns, or in property situated therein, which was returned for taxation. Manufacturer who so invested paid only one-fifth, or One Hundred Dollars ($100.00).

The Bethlehem Motors Corporation, and others, brought suit to restrain the enforcement of the tax upon the ground that it constituted a discrimination against non-resident manufacturers, in violation of the equal protection clause of the 14th Amendment; and upon the additional ground that the act was an attempt to regulate interstate commerce in violation of Article I, Section 8 of the Constitution. This Court held that the tax statute violated both of these provisions of the Constitution. In holding that this tax statute violated the equal protection clause and constituted discrimination, the Court said this:

> "The condition can be satisfied by a resident manufacturer, his factory and his products in the first instance being within the state; it cannot be satisfied by a non-resident manufacturer, his factory manifestly being in another state, some of its products only at a given time being within the state."

As to the commerce clause, the Court held:

> "It is the finding of the Court that the automobiles were in the hands of the agents of the consigning corporations and, therefore, a tax against them was practically a tax on their importation into the state."

The distinction between the *Armour* case and the *Bethlehem Motor* case is this: that in the *Armour* case the statute classified merchants according to the place from which merchandise was sold; while in the *Bethlehem* case there was, in reality, no classification. This is also true in the *Caskey Baking Company* case. However, even if there were an attempted classification in the *Bethlehem Motors* case, the classification was held to be a discrimination because of the inability of the non-resident manufacturer to comply,

hence the classification was unreasonable. Where a condition cannot be performed, it is unreasonable.

Therefore, it can certainly be said that the *Armour* case and the *Bethlehem Motor* case are quite different and that the *Armour* case does not rule the instant case. We do not think that the Supreme Court is now being called upon to reverse the holding in the *Armour* case; nor do we think that the *Bethlehem Motor* case had the effect of reversing that holding. The cases are clearly distinguishable, and the *Caskey* case clearly comes within the holding of the *Bethlehem Motor Company* case.

IV.

The Challenged Statute Does Not Unlawfully Discriminate Against Appellant's Goods by Reason of Their Source or Place of Manufacture, or Otherwise.

It is admitted by appellee that if a statute discriminates against goods because of their source or place of manufacture, then the statute is unconstitutional. But appellee denies that Section 192b has this result. However, a consideration of the operation and effect of the statute, which is the true test, does result in a discrimination against the products of the appellant because of their place of manufacture. Any person, with the United States Constitution as his only authority, would say that from the facts and circumstances in this case, there is an actual discrimination.

In *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, a statute identical with Section 192b, was held to be discriminatory in effect, because it forced the extra state manufacturer into the state in order to escape the tax. And appellant admits that the only manner in which the appellant as a manufacturer can escape the tax is to come into the State of Virginia.

Appellee suggests that appellant can escape the peddlers' tax by becoming a wholesaler or distributor in Virginia. Appellant probably could but it would lose its identity as a manufacturer, a burden which the resident manufacturer is

not compelled to assume. Why should appellant concede that it is what it is not?

A corporation in Virginia, as has been pointed out heretofore, cannot escape the tax on capital. It is an impossibility, even though the manufacturing is performed without, so long as its offices are located within the State. *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15. If its offices and factory are situated outside of the State then the tax immediately applies and the discrimination becomes evident. Once out of Virginia and you are taxed, stay in and you are exempt.

The cases cited by appellee under this heading, to illustrate the lack of discrimination, do not apply to the case at bar.

Hammond Packing Co. v. *Montana*, 233 U. S. 331, taxed oleomargarine but exempted butter. The distinction was held reasonable, just as it was in *Capital City Dairy Co.* v. *Ohio*, because oleomargarine could be so manufactured as to be harmful to the public. In appellant's case it has been agreed no such harm exists. (R. 17.)

Armour Packing Co. v. *Lacy*, 200 U. S. 226, upheld a statute levying a tax on the operation of meat packing houses, but not on merchants selling the products thereof. The two occupations were different from each other, and the tax applied to non-residents as well as residents.

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, declared valid classification for taxation of bituminous coal and anthracite, the one being taxed, the other exempt. Obviously so, The Court found that the uses to which the former could be put differentiated it from mere fuel, which was the only use for anthracite coal.

In *Quong Wing* v. *Kirkendall*, 223 U. S. 259, a differentiation between the subjects of taxation was sufficient to justify the classification was found by the Court.

In *Alaska Fish Salting and By Products Co.* v. *Smith*, 255 U. S. 44, a manufacturer of fertilizer from herring was taxed but a manufacturer of fertilizer from other fish was not taxed. The Court found that the general welfare, and

consideration of natural resources justified the distinction.

In *Indiana* v. *Jackson*, 283 U. S. 527, the classification of the operator of a chain store system as distinct from the operator of a single store, for taxation purposes, was held reasonable. The advantages and disadvantages distinguishing the former from the latter determined that they were not similarly situated.

In *Madden* v. *Kentucky*, 309 U. S. 83, a higher tax on deposits of residents in out of state banks than on deposits in local banks was held constitutional. The difference in the difficulties of collection, the latter being self enforcing and the former difficult of enforcement, sustained the distinction.

In *Hicklin* v. *Coney*, 290 U. S. 169, it was found that the persons exempted, farmers, dairymen, etc., either transported their own products or transported the products of others so infrequently, not as a regular business, that their inclusion in a class distinct from persons operating as contract carriers for hire, was reasonable. A tax on the latter class was, therefore, held valid.

In *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, a statute exempted persons who carried their own livestock and farm products to market, or supplies for their own use in their own motor vehicles, at seasonal times, and also persons in a city or town or who operated within a twenty-five mile radius thereof, and taxed persons who used the highways of the State constantly for the transportation of their products. The distinction was held valid because the former used the highways infrequently and therefore demanded less regulation than those using them almost daily.

In all of the above cases cited by appellee it will be particularly noted that there was no distinction or classification made which was based upon the fact of residence in or out of the State. The statutes applied to all alike.

SUMMARY.

It is respectfully urged, therefore, that the authorities cited by the appellee and the contentions based upon them, have no application to the case at bar, that the assignments of error should be sustained, and that the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

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